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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

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# No. 19

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HARRY BRIDGES,

*Petitioner,*

*vs.*

STATE OF CALIFORNIA,

*Respondent.*

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## PETITIONER'S REPLY BRIEF.

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### I.

**The Petition Presents a Federal Question: What Constitutes Contempt of Court by Publications is No Longer Merely a Matter of Local Law.**

The respondent has argued, that "the instant petition presents no Federal question; what constitutes contempt is a matter of local law". (Respondent's Point I, Res. Br. 2-11, Res. Supp. Br. 45-49.)

This confessedly was true in 1907; for that is the effect of the majority view in *Patterson* v. *Colorado*, 205 U. S. 454. It is no longer the law today, where the alleged contempt

is the result of the expression of opinion. For the exercise of freedom of expression, it is now definitively determined by this Court, is an exercise of a Federal constitutional right.

From *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 538 (1922):

"* * * Neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restriction about 'freedom of speech'," to *Near* v. *Minnesota*, 283 U. S. 697 (1931): "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by State action", is less than a decade in the history of this Court. The law of less than a decade ago on this subject, is not the law today.

Justice Holmes lived to repudiate each of the three major propositions espoused by him in the *Patterson* case; and later to concur with the viewpoint expressed in Justice Harlan's dissent.

He pioneered in rejecting the "dangerous tendency" doctrine, substituting for it the "clear and present danger" standard; he was first, in later years, to urge that freedom of thought should be protected by the Federal Constitution from State invasion and that freedom of speech means not alone immunity from previous restraint.

Even more significant was his repudiation of the "tendency" doctrine in his (and Justice Brandeis') dissent in the *Toledo Newspaper* case, 247 U. S. 402.[1]

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[1] Prof. Zechariah Chaffee, Jr., the outstanding scholar on freedom of speech, so believes. "Fortunately he (Justice Holmes) has now repudiated this (the Blackstonian) interpretation of freedom of speech." *Chaffee, Freedom of Speech*, p. 8. Prof. Chaffee then cites the *Schenck* and *Abrams* cases, in each of which Justice Holmes enunciated the "clear and present danger" rule.

Certain it is, moreover, that it is no longer the law, that "the demands of due process are met by adequate notice of hearing, and opportunity to be heard" (Res. Br. 6) *Mooney* v. *Holohan*, 294 U. S. 103, expressly rejected a similar contention by the State of California.

## II.

**(a) The "Reasonable Tendency" Doctrine, Espoused by the Respondent, and Adopted and Applied by the Court Below, is Not an Ancient and Well-defined Common-law Principle; it is a New Dogma. (Respondent's Point I, Res. Supp. Br. 8-23).**

The respondent urges that this test is of "indubitable antiquity" (Res. Supp. Br. 8); that it is "the common-law of centuries" (Res. Supp. Br. 19); that it is the "ancient common law standard (Res. Br. 26), successfully administered for "some two hundred years or more" (Res. Supp. Br. 30). We demur to these claims. History does not support them.[1a]

Not until the *Toledo* case (1921) does that test finds its way in the decisions.[2] *Not one* of the early cases, cited by respondent invokes or applies the rule. Nor has the Supreme Court of California ever done so prior to the instant case.

(Indeed, in *Near* v. *Minnesota*, 283 U. S., at p. 715 (as quoted in Res. Supp. Br. 8), the phrase used is "There is

[1a] Moreover, the early cases in the United States adhered strictly to the Blackstonian views upon free speech now happily discarded by this Court. Chaffee refers to *Respublica* v. *Oswald* Dall. 319 (Pa.) (cited by the respondent) (Res. Br. 8, 12), as an example of the application of the now rejected view. He adds: "The Federalist Judges of that time were so notorious for their slavish adherence to English authorities in disregard of our own constitutions and statutes, that their Blackstonian statements should have little weight in the construction of constitutional guaranties". *Chaffee, Freedom of Speech*, 8, 9.

[2] Over the dissents of Justices Brandeis and Holmes.

also the conceded authority of the courts to punish for contempt when publications *directly tend* to present the proper discharge of judicial functions." (Italics ours.) This concept constitutes a forerunner of the "clear and present danger" rule first expressly applied in the *Herndon* case.)

Accordingly, the doctrine invoked by the court below is of comparatively *recent* origin.[3]

It is to be noted, moreover, that the "reasonable tendency" standard was not applied in the instant case, until it reached the Supreme Court of California. Prior thereto it was the "inherent tendency" formula. The charge against the petitioner was to the effect that the statements contained in the telegram, and the publication of its contents "were in and of themselves calculated and had an *inherent* tendency to interfere with influence, sway and control" (Judge Schmidt) and to "interfere with the orderly and due administration of justice * * *" (R. 4).

Upon *that* theory alone was the petitioner convicted, the trial court finding that the sending of the telegram and the publication of its contents "were in and of themselves calculated, and had an *inherent* tendency to interfere with the orderly administration of justice", etc. (Italics ours.)

It was not until the proceeding reached the Supreme Court of California, did this *novel* doctrine in the California law first find espousal by the California courts.

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[3] In the course of the oral argument in the case at bar, in reply to an inquiry from Justice Frankfurter, as to whether the doctrine was of ancient source, and was in effect at the time of the adoption of the Constitution, petitioner's counsel answered in the affirmative. This was due to a misunderstanding of the question on counsel's part. We confused the question and thought we were replying to an inquiry as to whether the courts had asserted an alleged "inherent power" to punish for constructive contempt, irrespective of statutory or constitutional authority. The assertion of such "inherent" authority is conceded to be ancient.

Cf. Fox, History of Contempt;
Frankfurter and Landis, 37 Harvard Law Review 1010;
Nelles and King, 28 Columbia Law Rev. 401, 525.

**(b) Ancient Error May No Longer Parade as Truth Before this Court.**

Even if our challenge of the historicity of the test proposed by the Respondent is to be rejected, mere antiquity is no longer sufficient ground in this Court for perpetuation of error. At the last term this Court upset a century-old practice.[4] Principles of constitutional law are to be determined not *in vacuo*, but in accordance with the imperative social needs of a changing and growing democracy; they are "fluid and dynamic."[5]

*Stare decisis* is not "a universal, an inexorable command."[6]

"Modification implies growth. It is the life of the law."[7]

"To rest upon an ancient formula, is a slumber, which, if prolonged, means death."

III.

**The Distinction Between the "Clear and Present Danger" Rule, and the Reasonable Tendency Test is Vital.**

The respondent's claim that there is no distinction between the two is without substance (Res. Br. 19; Res. Supp. Br. 18).[7a]

The essential difference is: the former rule is substantially *objective*; the latter entirely *subjective*. (The uncertainty of the subjective doctrine is discussed in Petitioner's Brief, 5-15.)

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[4] *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64.

[5] Cardozo, "Nature of Judicial Process", 81.

[6] Justice Brandeis, dissenting in *Washington* v. *Dawson Co.*, 264 U. S. 219, 238.

[7] Justice Brandeis, quoted by Cardozo, "Law and Literature", p. 15.

[7a] The court below acknowledged the distinction. In its opinion it expressly rejected the "clear and present danger" rule (R. 158).

We have suggested at least two objective elements. Pet. Br. 19-20.

A practical example [8] is afforded by the instant case. It may be claimed that the application of the reasonable tendency test will support the conviction of the petitioner; no contention is, or can be made, that the application of the "clear and present danger" criterion, assuming the adoption of the objective standards suggested by the petitioner, will permit the judgment to stand, for

(A) There is no evidence in the record in the instant case that the publication of the telegram came to the attention of the court before whom the cause was alleged to be pending.

(B) The evidence not only discloses *no* express intent to influence any judge of the Superior Court of California, but is, on the contrary, affirmatively to the effect that the petitioner had no such intent. The trial court upon the conclusion of the hearing expressly stated:

> "I do not think it (the telegram) was sent with the specific intent of influencing Judge Schmidt in his decision" (R. 47).

Further practical examples may be found in the decisions of this Court in *Abrams* v. *U. S.*, 250 U. S. 616, *Schaefer* v. *U. S.*, 251 U. S. 466, and *Gitlow* v. *New York*, 268 U. S. 652; the difference between the application of the two tests there, meant the difference between guilt and innocence; the majority of the Court upheld the convictions in each instance by applying the tendency rule; Justices Holmes and Brandeis dissented because they held that the convictions could not stand up under the "clear and present" standard.

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[8] To comply with Justice Frankfurter's request made in the course of the oral argument.

The rejection of the tendency doctrine in the *Herndon* case has been adequately discussed, heretofore. It is to be noted, moreover, that in the reaffirmance and extension of the "clear and present" rule in the last term of this Court, in each of the cases considered, the Court rejected again the "tendency" doctrine urged upon it.[9]

In addition, in the application of the "clear and present danger" rule, *intent* has been recognized as an important element.[10] As originally expounded by Justice Brandeis, intent is mentioned:

> "That the necessity which is essential to valid restriction does not exist unless speech would produce, *or is intended to produce*, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled." (Italics ours.) [11]

In the free speech decisions of this Court, the more recent the case, the greater is the emphasis upon the existence or absence of intent to accomplish the substantive evil which is within the allowable area of State or Federal control, as the basis for upholding, and annulling, respectively, of convictions.

Thus in *Debs* v. *U. S.*, 249 U. S. 311, 312, Justice Holmes, speaking for the Court, upheld the judgment only because there was a "manifest intent" to encourage resistance to the draft. The Court (p. 215) required a concurrence of intent *and* probable effect, stating (p. 216):

> "We should add that the jury were most carefully instructed that they could not find the defendant guilty

[9] See *Carlson* v. *California*, 310 U. S. 106, Appellee's Brief, summarized at p. 107.

*Cantwell* v. *Conn.*, 310 U. S. 297, Appellee's Brief, summarized at p. 299.

[10] Justice Stone, in the course of the oral argument, seemed to question the pertinency of intent to influence a court, as an element of the offense of contempt by publication.

We do not suggest his "questioning" was hostile. It was in the "Socratic manner."

[11] *Whitney* v. *California*, 274 U. S. 357, 372.

for advocacy of any of his opinions unless the words used had as their natural tendency *and* reasonably probable effect to obstruct the recruiting service, etc., and unless the defendant had the *specific intent* to do so in his mind." (Italics ours.)

Soon thereafter Justice Holmes, in his dissent in *Abrams* v. *U. S.*, 250 U. S. 616, 626, discussed the importance of intent in prosecutions for utterances:

> "I am aware of course that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law may be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence would follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind."
>
> "An actual intent * * * is necessary to constitute an attempt, when a further act of the same individual is required to complete the substantive crime for reasons given in *Swift* v. *U. S.*, 196 U. S. 375, 396.
>
> "It is necessary when the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils to be checked" (at p. 628).[12]

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[12] In *Swift* v. *U. S.*, *supra*, at p. 396, Justice Holmes said:

"Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further action in addition to the mere forces of nature to bring the result to pass, an *intent* to bring it to pass is necessary in order to produce a *dangerous probability* that it will happen." (Italics ours.)

These views applied to the case at bar are peculiarly apt.

For the petitioner to accomplish the evil complained of, namely, influencing Judge Schmidt in Los Angeles, he had to rely upon others:

First: upon his Secretary to deliver a copy of the telegram to the Publicity Director of the C. I. O.

Secondly: upon the Publicity Director to:

(a) release the contents of the telegram to the press and

(b) release it in such a manner that the Associated Press would transmit a copy of the telegram to the Los Angeles newspapers, and be published by them; and

Thirdly: upon some newsboy in Los Angeles to deliver a copy of a newspaper containing a copy of the telegram.[12a]

The petitioner gave no express orders for the doing of any of the above.

In the more recent decisions of this Court intent is always considered, often emphasized. This is true in the *Herndon* case (301 U. S. at pp. 259, 260, 262), in the *Thornhill* decision, 310 U. S. at p. 100, footnote 17; and in *Cantwell* v. *Connecticut*, 310 U. S. at p. 308.

It is to be noted, moreover, that in the instant case, an express intent to influence Judge Schmidt was charged (R. 3).[13] But the proof did not support the charge, and the trial court found the exact convers [14] (R. 47). This is conceded by the respondent (Res. Supp. Br. 66).

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[12a] Chief Justice Gilson, below, recognized "intent" as an important element of the offense. (Quoted in Pet. Br. 17; R. in No. 64, 140.)

[13] It is charged that the contents of the telegram "were put in the course of publication by said H. R. Bridges for the purpose of bringing the same to the *personal* attention of and influencing the said Ruben S. Schmidt," etc. (R. 3).

[14] "* * * but because it seems to me to be a reasonable inference to be drawn from all the circumstances of his sending of the telegram, that *there was no specific intent on his part to use this telegram as a subterfuge to get his message over to the judge.* I do not think it was sent with the specific intent of influencing Judge Schmidt in his decision" (R. 47). (Italics ours.)

## IV.

**The Reasonable Tendency Test Adopted by the Court Below is Not the Application of a Common-Law Standard; Nor Has the Legislature of California Prescribed Such a Standard (Res. Supp. Br. 32-35).**

The respondent, in the oral argument, in an effort to distinguish away the *Herndon* case, asserted for the first time —never heretofore claimed in the courts below, nor in this Court—that Sec. 1209, subsection 9, of the California Code of Civil Procedure will support the judgment. That section reads:

> "Sec. 1209. The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court.
>
> 9. Any other unlawful interference with the process or proceedings of a court."

It is argued that subsection 9 constitutes an acceptance by the California Legislature of the ancient practices and standards of the judges *in re* contempt as sanctioned by the common-law.

But subsection 13 is forgotten. On the precise question of contempt by publication, the California Legislature abandoned any common-law test in the nineteenth century (1891) by enacting that:

> "But no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings" (R. 147).

The legislative will was nullified by the court below; it held [15] the legislative determination to be a violation of the

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[15] Over the vigorous dissents of Justice Edmonds (R. 161), and Chief Justice Gibson (reported in No. 64, R. 140).

"inherent" authority of the courts to punish for constructive contempt by publication.

In any event, if subsection 9 of Section 1209, C. C. P., is now relied on by the respondent, the petitioner challenges that subsection, as offending Federal due process because of its vagueness and uncertainty [16]

## V.

**There is No Evidence in the Record of Any "Clear and Present Danger" to the Independence of the Los Angeles Superior Court.**

The allegations by the respondent to the contrary effect are highly improper, substantially false and wholly *de hors* the record [17] (Res. Supp. Br. 56-60).

The serious charges lodged by the respondent against both the C. I. O. and A. F. of L. are utterly *false*. Such irresponsible allegations call for *proof*. No such evidence was adduced in the instant case; no such proof was even proffered. They are nowhere even mentioned in the record.

Respondent's statement that the matters were before the

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[16] Compare, Justice Murphy in *Thornhill* case, at p. 100:

"The words themselves have no ascertainable meaning either inherent or historical."

Accord; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453:

"No one may be required at price of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

In the oral argument respondent's counsel dubbed this subsection as an "omnibus clause", in the nature of a "catch-all" provision. Penal statutes may not, without offending Federal due process, serve as "catch-alls"; and this is the more true in the domain of free speech.

[17] Allegations *de hors* the record, contained in a brief, have been disregarded and condemned by this Court.

*Schley* v. *Pullman Car Co.*, 120 U. S. 575, 578; *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792, 796; *Hussman* v. *Durham*, 165 U. S. 144, 150.

This Court cannot take judicial notice of controverted allegations concerning local conditions in a community three thousand miles away. Particularly is this true when the local courts have not done so.

judge "of which he could and presumably did take notice" (Res. Supp. Br. 56) are equally untrue.

The trial judge took no such notice; nor was he even requested, according to our best recollection, to take notice of what is essentially the product of the respondent's perfervid imagination, instead of a dispassionate statement of alleged facts.

So far as the Supreme Court of California is concerned, that court, in effect, *refused* to take the judicial notice requested by the respondent in its *brief* (not in the record), by expressly *rejecting* the application of the "clear and present danger" rule (R. 158). No mention is made by that court of any of the matters contended for by the respondent.[18]

VI.

**The Telegram Was Merely a Legitimate Announcement by the Petitioner that the Members of the Petitioner's Union Would Resort to Legal Action.**

It was not a "threat" as suggested by the respondent (Res. Supp. Br. 82) and by the court below (R. 156).

Even if the telegram be construed as a warning of an impending strike, the right on the part of workers to resort to such economic action is now well established.

It is to be borne in mind that "A 'threat' may be a warning of violence; it may be merely a warning that one will do a legally permissible act." [19]

[18] Counsel for respondent themselves suggest a doubt as to the propriety of these allegations (Res. Supp. Br. 49). The statement that Judge Schmidt ultimately reversed himself, is even the more reprehensible and indefensible (Res. Supp. Br. 65, 82). It nowhere appears in the record. The prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Justice Sutherland, in *Berges* v. *U. S.*, 295 U. S. 78, 88.

Cf. Justice Brandeis, dissenting, in *Olmstead* v. *U. S.*, 277 U. S. 438, 485.

[19] Frankfurter, "The Labor Injunction", p. 34.

Cf. Holmes, in *Vegelahn* v. *Guntner*, 167 Mass. 97, 107 (1896):

"As a general rule, even if subject to some exceptions, what you may do in a certain event, you may threaten to do, that is, give warning of your intention to do * * *."

## VII.

**No Evidence Was Adduced Below, Nor Is There a Finding to the Effect That There Was an Actual Interference With the Administration of Justice.**

The respondent's intimations and statements to the contrary are in error (Res. Br. 27; Res. Supp. Br. 39, 64, 81).

The trial court's observation that the telegram and its publication "did embarrass and disturb the administration" (Res. Supp. Br. 8) (R. 46) was an informal comment that was not incorporated in the judgment; it has *no* support in the evidence.

The phrase that the petitioner "unlawfully interfered with the proceedings of this Court (Res. Supp. Br. 39, R. 52) is found only in that portion of the judgment which contains the conclusions of law, and *not* the findings; and does not purport to be a finding of fact.

## VIII.

**This Court Will Review the Evidence and Determine Whether a Federal Constitutional Right Has In Fact Been Abridged.**

We dissent from the respondent's position (Res. Supp. Br. 50-54) that only in the event this Court rules that the courts below applied an erroneous standard of guilt will it examine the evidence.

Under Point 4, in petitioner's brief (Pet. Br. 38) we urged:

> "There Is No Evidence to Support the Conviction of Contempt. A Contempt Judgment, Based Upon a Publication, in the Absence of Supporting Evidence, Denies Federal Due Process."

No matter what doctrine the State court applied, this Court will review the evidence, since the petitioner has

properly asserted a claim that the *judgment* below (not alone the standard applied below) deprives him of freedom of speech.[20]

The application of *either* the "clear and present danger" or "tendency" rule, to the meager evidence in the record, abridges the petitioner's Federal constitutional right to freedom of expression.

## Conclusion.

There are many who believe that criticism of the decisions of the judges, if the democratic process is to be maintained and encouraged, is not only not to be avoided, but to be encouraged; that the "Ivory Tower" is not a fit permanent abode for the judicial spirit. Judicial scholars have urged that "other social interests may be paramount to the insulation of justice".[21] Great jurists have recognized that the issues facing determination by the judiciary are the problems of statesmanship.[22] "The great tides and currents which engulf the rest of men, do not turn aside in their course and pass the judges by."[23]

The cure for the "evil" of public discussion of public issues pending in the courts lies with the judges—not through the exercise of the contempt power by enjoining

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[20] *Pierre* v. *Louisiana*, 306 U. S. 354, at 358:

"When a claim is properly asserted * * * it becomes our solemn duty to make independent inquiry and determination of the disputed facts."

*Norris* v. *Ala.*, 294 U. S. 587, 590:

"That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied.

"When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect. If this requires an examination of evidence, the examination will be made."

[21] *Nelles and King* "Contempt by Publication", 28 Columbia Law Review, at p. 549.

[22] Cf. Holmes, The Path of the Law.
Cardozo, Nature of Judicial Process.

[23] Cardozo, *ibid*, p. 107.

the functioning of a free press, and thus achieving a "silence coerced by law";[24] but through the exercise of "reasonable fortitude". Only this exercise will protect the judiciary from the protests of the labor leader, the comment of the newspaper, and the clamor of the mob, and only thus can the "Independence of the Judiciary" be reconciled with the "Freedom of the Press."

Respectfully submitted,

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[24] From Justice Brandeis, concurring in the *Whitney* case, *supra*.